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Bergen County Circuit Court.

LEMBECK & BETZ EAGLE BREWING COMPANY, a corporation,
Plaintiff,
Appellee,

vs.

OTTO H. KRAUSE,
Defendant,
Appellant.

Action at Law.
Notice and
Grounds of Appeal

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To D. EUGENE BLANKENHORN, Esquire,

Attorney of the Plaintiff, Appellee:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The Court improperly and unjustly struck out the defense of the defendant and ordered final judgment to be entered for the plaintiff for the sum of $2,588.00 and costs. 20

2. The defendant filed an answer to the plaintiff's complaint, which answer presented a legal defense. This answer was improperly struck out and judgment final was awarded to the plaintiff and against the defendant for the sum of $2,588.00 and costs.

3. The Court improperly gave judgment for the plaintiff for $2,588.00 and costs.

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4. The Court on motion of the plaintiff struck out the answer of the defendant, whereas it should have refused to strike out the answer.

A. C. HART & VANDERWART,

Attorneys of Defendant.

Dated, August 8th, 1919.

ENDORSEMENT.

BERGEN COUNTY CIRCUIT COURT.

Lembeck & Betz Eagle Brewing Company, a corporation,
Plaintiff,

vs.

Otto H. Krause,
Defendant.

ACTION AT LAW.

NOTICE AND GROUNDS OF APPEAL.

A. C. Hart & Vanderwart
Law Offices
Hackensack, N. J.

Service acknowledged Aug. 14, 1919.
D. EUGENE BLANKENHORN,
Plaintiff's Attorney.

Filed August 19, 1919.
GEORGE VAN BUSKIRK,
7262 County Clerk.

I hereby certify that the foregoing is a true copy of the notice and grounds of appeal filed in my office on August 19, 1919; and that I have annexed hereto a true transcript of everything required by law to be removed; all of which I accordingly transmit to the Court of Errors and Appeals of the State of New Jersey.

GEORGE VAN BUSKIRK,
Clerk.
By W. S. Doremus, Dy.

SUMMONS.

THE STATE OF NEW JERSEY,

[L.S.]

To Otto H. Krause: You are hereby summoned to answer the annexed complaint of Lembeck & Betz Eagle Brewing Company, a corporation of New Jersey, in an action at law in the Bergen County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the Bergen County Circuit Court, at Hackensack, within twenty days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, WILLARD W. CUTLER, Esquire, Judge of the Bergen County Circuit Court, at Hackensack, this 2nd day of June, 1919.

GEORGE VAN BUSKIRK,
Clerk.

D. EUGENE BLANKENHORN,
Attorney.

BERGEN COUNTY CIRCUIT COURT.

COMPLAINT.

LEMBECK & BETZ EAGLE BREWING COMPANY, a corporation, Plaintiff, vs. OTTO H. KRAUSE, Defendant,	Action at Law. Complaint.

Plaintiff, Lembeck & Betz Eagle Brewing Company, having its principal office and place of business at 173 Ninth Street, Jersey City, New Jersey, says that:

1. On February 28th, 1910, defendant, Otto H. Krause being indebted to plaintiff in the sum of $2,700 in order to secure the payment of said sum made, executed and delivered to plaintiff his certain indenture of chattel mortgage, sealed with his seal, wherein and whereby said defendant among other things covenanted, promised and agreed to and with plaintiff to pay to plaintiff said sum of $2,700 on demand as by said chattel mortgage, a copy of which is hereto annexed and made a part hereof, reference thereunto being had, will more fully appear.

2. By said chattel mortgage, defendant conveyed to plaintiff certain chattels enumerated in the schedule thereunto annexed upon condition that such conveyance should be void if payment of said sum of $2,700.00 should be made to plaintiff on demand.

3. Said chattel mortgage contained the covenant that if default should be made in the payment of said sum plaintiff should have the authority with the aid of any person to take said chattels and dispose of same for the best price they could obtain and out of the money arising

therefrom to retain and pay the said sum of $2,700.00 and all charges touching same, rendering the overplus, if any, to defendant.

4. On May 9th, 1919, plaintiff demanded payment from defendant of said sum of $2,700.00 and defendant refused and neglected to pay said sum.

5. On May 27, 1919, by virtue of the covenants contained in said chattel mortgage, as hereinabove set forth, plaintiff caused to be sold at public sale the chattels mentioned in said mortgage for the best price it could obtain and said chattels were sold for the sum of $30.00, being the highest price plaintiff could obtain.

6. Plaintiff paid charges for conducting said sale amounting to $30.00. After paying the proper charges for making sale of said chattels in accordance with the provisions of said chattel mortgage, there is nothing in the hands of plaintiff to be applied in payment on account of the said sum of $2,700.00 and the whole of said sum of $2,700.00 remains due and owing from the defendant to the plaintiff.

7. Plaintiff has not paid said sum of $2,700.00, and the whole thereof together with interest thereon from May 27, 1919, is now due and owing from defendant to plaintiff.

8. Plaintiff demands as damages $2,700.00 with interest thereon from May 27, 1919, besides costs of this suit.

D. EUGENE BLANKENHORN,

Plaintiff's Attorney.

THE STATE OF NEW JERSEY,
COUNTY OF BERGEN, } ss.:

W. V. A. Blauvelt, being duly sworn, according to law, on his oath deposes and says:

That he is the special deputy sheriff named in the deputization endorsed and made a part hereof, and that on the 2nd day of June, 1919, instant, he served the said summons and complaint, together with the notices endorsed thereon upon the defendant named, Otto H. Krause, in person at his place of abode, Main Street, Hackensack, N. J., by exhibiting the said summons and complaint and notices to said defendant and explaining to him the contents thereof and by delivering to Otto H. Krause a true copy of said summons and complaint, together with the notices thereon.

Sworn and subscribed to before me this 4th day of June, 1919.

W. V. A. BLAUVELT.

BESSIE HETHERINGTON,
Notary Public of New Jersey.

I, John W. Courter, Sheriff of said County, do hereby deputize and appoint W. V. A. Blauvelt to be my special deputy to execute and return the writ according to law.

Witness, my hand and seal this third day of June 1919.

JOHN W. COURTER,
Sheriff. [L.S.]

WALTER SCOTT,
Under Sheriff.

John W. Courter, Sheriff.
Walter Scott, Under Sheriff.
Bergen County, Hackensack, N. J.
Sheriff's fees $2.69.

TO ALL TO WHOM THESE PRESENTS SHALL COME: KNOW YE, That I, Otto H. Krause, of the Township of New Barbadoes, County of Bergen and State of New Jersey, party of the first part, for securing the payment of money hereinafter mentioned, and in consideration of the sum of One Dollar to me duly paid by the Lembeck & Betz Eagle Brewing Company, a corporation of the State of New Jersey, party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant, bargain and sell unto the said party of the second part its successors and assigns all the goods and chattels mentioned in the schedule hereunto annexed and now in the bottling house known as the Fairmount Bottling Establishment and premises on the easterly side of the road leading from Hackensack to New Bridge, Fairmount, Hackensack, Bergen County, New Jersey.

TO HAVE AND TO HOLD all and singular the goods and chattels above bargained and sold, or intended so to be, unto the said party of the second part, its successors and assigns forever. And I, the said party of the first part, for myself, my heirs, executors and administrators all and singular the said goods and chattels above bargained and sold, unto the said party of the second part, its successors and assigns, against the said party of the first part, and against all and every person or persons whomsoever, shall and will warrant and forever defend, upon condition that if the said party of the first part shall and do well and truly pay unto the said party of the second part, its successors, executors, administrators or assigns on demand, the just and full sum of Twenty-seven Hundred Dollars, according to the tenor of a certain promissory note of even date herewith and made by the said party of the first part to the said party of the second part hereto, then these presents shall be void. And I, the said party of the first part, for myself, my heirs, executors, administrators and assigns do covenant and agree to and with the said party of the second part, its successors and assigns

that in case default shall be made in the payment of the said sum above mentioned, or in case the said party of the first part shall at any time before the day of payment herein provided for, remove the said goods and chattels or any of them or permit or suffer any attachment or other process against property to be issued against me the said party of the first part, or permit or suffer any judgment to be entered against me then the said sum of money herein mentioned shall become instantly due and payable and it shall and may be lawful for, and I, the said party of the first part do hereby authorize and empower the said party of the second part, its successors, administrators and assigns, with the aid and assistance of any person or persons to enter any dwelling house, store and other premises and such other place or places as the said goods or chattels are or may be placed and take and carry away the said goods and chattels and to sell and dispose of the same for the best price they can obtain; and out of the money arising therefrom, to retain and pay the said sum above mentioned and all charges touching the same rendering the overplus (if any) unto the said party of the first part, or to my executors, administrators or assigns. And until default be made in the payment of said sum of money I, the said party of the first part to remain and continue in the quiet and peaceable possession of the said goods and chattels and a full and free enjoyment of the same. And I the said party of the first part for myself, my heirs, executors, administrators and assigns do hereby covenant, promise and agree to and with the said party of the second part, its successors and assigns to pay the said sum of money and interest above mentioned at the time and times and in the manner above mentioned.

IN WITNESS WHEREOF, I, the said party of the first part have hereunto set my hand and seal the 28th day of February, 1910.

OTTO H. KRAUSE, [L.S.]

Sealed and delivered in the presence of:
D. EUGENE BLANKENHORN.

SCHEDULE.

4 horses,
4 platform spring wagons,
2 sets of team harness,
2 sets single harness,
500 boxes and bottles,
1 crown corking machine,
1 label machine,
2 wash machines,

and all other goods and chattels now in the bottling house known as the Fairmount Bottling Establishment and premises on the easterly side of road leading from Hackensack to New Bridge, Hackensack, Bergen County, New Jersey.

OTTO H. KRAUSE.

Witness:
D. EUGENE BLANKENHORN.

THE STATE OF NEW JERSEY,
COUNTY OF BERGEN, } ss.:

BE IT REMEMBERED that on this 28th day of February, in the year of our Lord One Thousand Nine Hundred and Ten, before me a Master in Chancery of New Jersey, personally appeared Otto H. Krause, who, I am satisfied is the grantor mentioned in the foregoing Chattel Mortgage, to whom I first made known the contents thereof and thereupon acknowledged that he signed sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

D. EUGENE BLANKENHORN,
Master in Chancery of N. J.

THE STATE OF NEW JERSEY,
COUNTY OF BERGEN, } SS.:

Herman H. Horstmann of full age, being duly sworn, on his oath, saith that he is the agent of the holder of this Mortgage. That the amount due and to grow due on said Mortgage is the sum of $2700.00 together with interest on said sum at the rate of 5% per annum payable
That the consideration of said mortgage is as follows: The just and full sum of Fifteen Hundred Dollars being money loaned and advanced said Mortgagor by the said mortgagee.

Sworn to and Subscribed before me this 28th day of February, A.D., 1910.

H. H. HORSTMANN.

D. EUGENE BLANKENHORN,
Master in Chancery of New Jersey.

Dated 191

OTTO H. KRAUSE

to

LEMBECK & BETZ EAGLE BREWING COMPANY

MORTGAGE ON PERSONAL PROPERTY

Received in the Clerk's Office of the County of Bergen, New Jersey, on the 28th day of Feb'y, A.D., 1910, at 12 o'clock in the noon and recorded in Book 39 of Chattel Mortgages for said County, on page 23.

BERGEN COUNTY CIRCUIT COURT.

LEMBECK & BETZ EAGLE BREWING COMPANY, a corporation,
Plaintiff,
vs.
OTTO H. KRAUSE,
Defendant,

Action at Law.

SUMMONS AND COMPLAINT.

See affidavit of service attached.

D. EUGENE BLANKENHORN,
Plaintiff's Attorney,
15 Exchange Place,
Jersey City, N. J.

To the within named defendant:

Take notice that if the within summons and complaint be served upon you personally and you intend to make defense then you must file an affidavit of merits within ten days of such service and must file an answer within twenty days of such service; and that in default thereof, judgment will be entered against you.

D. EUGENE BLANKENHORN.

Filed June 7th, 1919.

GEORGE VAN BUSKIRK,
County Clerk.

7262

BERGEN COUNTY CIRCUIT COURT.

LEMBECK & BETZ EAGLE BREWING COMPANY, a corporation, Plaintiff, vs. OTTO H. KRAUSE, Defendant,	Action at Law. Affidavit of Merits.

THE STATE OF NEW JERSEY, COUNTY OF BERGEN, } ss.:

Otto H. Krause, being duly sworn, according to law, on his oath deposes and says:

That he is the defendant in the above stated cause and that he believes he has a just and legal cause to said action on the merits of the case.

OTTO H. KRAUSE.

Sworn and Subscribed to before me this 11th day of June, 1919.

FLORENCE E. CAMPBELL,
Notary Public of N. J.

Filed June 12, 1919.

(L.S.) GEORGE VAN BUSKIRK,
County Clerk.

7262

BERGEN COUNTY CIRCUIT COURT.

LEMBECK & BETZ EAGLE BREWING COMPANY, a corporation, Plaintiff, vs. OTTO H. KRAUSE, Defendant,	Action at Law. Answer of Defendant.

Otto H. Krause, residing at Hackensack, in the County of Bergen and State of New Jersey, answering the said complaint of the plaintiff says:

1. He neither admits nor denies the allegations contained in the 1st, 2nd, 3rd, 5th and 6th paragraphs of the complaint, but as to the same puts the plaintiff upon its proof.

2. Defendant denies the truth of the matters contained in paragraph 4 of the complaint.

3. Defendant denies the truth of the matters contained in paragraph 7 of the complaint.

FIRST DEFENSE

The cause of action alleged in the complaint herein did not accrue within six years before the beginning of this action.

SECOND DEFENSE

This action is apparently founded upon a covenant alleged to be contained in a chattel mortgage, a copy of which is attached to the complaint herein.

There is no covenant in the said chattel mortgage on the part of the defendant herein to pay moneys to the plaintiff herein.

THIRD DEFENSE

This action is apparently founded upon a chattel mortgage, a copy of which is attached to the complaint herein.

The condition of the chattel mortgage is that the sum of $2,700.00, the amount of a certain alleged promissory note be paid and should the said promissory note not be paid according to its tenor, that the condition be void.

This defense is that any cause of action possessed by the plaintiff herein against the defendant herein, must be

founded upon the alleged promissory note and the cause of action thereupon did not accrue within six years before the beginning of this action.

FOURTH DEFENSE

Defendant denies that any consideration existed in the execution of the chattel mortgage, upon which this action is founded.

FIFTH DEFENSE

The chattel mortgage upon which this action is founded, was executed and delivered, if at all, as security for the performance by the defendant herein of the condition of a certain promissory note.

The promissory note was the debt, the chattel mortgage the security.

The defendant denies that he owes anything to the plaintiff upon the chattel mortgage itself.

NOTICE:—The defendant will object at the time of the trial of this action that the complaint discloses no cause of action, because the chattel mortgage, a copy of which is attached to the pleadings herein, contain no covenant by the defendant wherein he promises and agrees to and with the plaintiff to pay to the plaintiff the sum of $2,700.00 on demand as the plaintiff alleges.

A. C. HART & VANDERWART,
Attorneys of Defendant.

BERGEN COUNTY CIRCUIT COURT.

Lembeck and Betz Eagle Brewing Company, a corporation,
Plaintiff,

-vs-

Otto H. Krause,
Defendant,

ACTION AT LAW
ANSWER OF DEFENDANT

A. C. HART & VANDERWART,
Attorneys of Defendant,
Hackensack, N. J.

7262 Filed, June 12th, 1919.

BERGEN COUNTY CIRCUIT COURT.

Between:
LEMBECK & BETZ EAGLE BREWING COMPANY, a corporation,
Plaintiff,
vs.
OTTO H. KRAUSE,
Defendant,

Action at Law.
Notice.

TAKE NOTICE that on Monday, July 7th, 1919, before the Honorable Willard W. Cutler, Judge of the Bergen County Circuit Court, on the ground that there is no defense to this action, I shall move to strike out the answer of the defendant in this case and also to strike out the 1st, 2nd, 3rd, 4th, and 5th defenses and that judgment final may be entered in favor of the plaintiff and against the defendant for the sum $2,588.00 with interest thereon from May 27, 1919, hereby waiving the demand for payment of the sum of $30 paid by the plaintiff for conducting said sale.

Copies of the affidavits upon which this motion shall be made verifying the cause of action are attached hereto and made a part hereof.

Respectfully,
D. EUGENE BLANKENHORN,
Plaintiff's Attorney.

To Messrs. A. C. Hart and Vanderwart,
Defendant's Attorneys,
Hackensack, N. J.

BERGEN COUNTY CIRCUIT COURT.

Between:
LEMBECK & BETZ EAGLE BREWING COMPANY, a corporation,
Plaintiff,
vs.
OTTO H. KRAUSE,
Defendant,

Action at Law.
Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } ss.:

Herman H. Horstmann of full age, being duly sworn according to law, on his oath deposes and says: I am the secretary of the plaintiff company; I am the bookkeeper in charge of the account of said company with the defendant, Otto H. Krause and am familiar with the chattel mortgage mentioned in the complaint.

The amount to secure the payment of which said chattel mortgage and the promissory note mentioned therein were given is made up in the following way:

On March 4, 1901, the plaintiff loaned to defendant $3,500 giving his check on the Third National Bank of Jersey City to his order for that sum. A copy of said check is hereto attached marked "Schedule A" being in the handwriting of Gustav W. Lembeck, who at that time was the treasurer of the company, bearing the signature of the said Gustav W. Lembeck and the counter-signature of Henry Lembeck, who was at the date of said check, the president of the plaintiff company; deponent knows the handwriting of said Gustav W. Lembeck and of the said Henry Lembeck and the signatures on said check are the signatures of said officers. Deponent further says that said check bears the endorsement of the defendant, Otto H. Krause.

Thereafter plaintiff made other loans to defendant and received payments on account of said loan or credited the account of the said defendant on its books with a so-called

discount or allowance due to him on account of moneys paid by defendant for goods purchased by defendant from plaintiff and paid for by him until about March 30, 1910. On said date the defendant owed the plaintiff $3,200.00 and the defendant, in order to secure the payment of said amount, gave to plaintiff his promissory note and chattel mortgage mentioned in the complaint, together with a mortgage covering real estate owned by defendant to secure the payment of $500.00. On October 19, 1918, defendant paid said $500.00 real estate mortgage leaving the said chattel mortgage unpaid.

Defendant is entitled to have credit on account of said sum of $2,700.00 an allowance of $112.00 discount or payments on account of moneys paid by said defendant for goods purchased and paid for by him from this company, and of payments made.

Attached to this affidavit and made a part hereof and marked "Schedule B" is a copy of the original entries in the books of account of plaintiff company kept by deponent showing a balance of $2,588.00 due from the defendant to the plaintiff.

Deponent says that none of said sum of $2,588.00 has been paid and that the whole amount thereof is now due and owing by defendant to the plaintiff.

Deponent further says that he believes that there is no defense to this action against the said Otto H. Krause and the said sum of $2,588.00 with interest thereon from May 9, 1919, is now due and owing from the defendant to the plaintiff.

HERMAN H. HORSTMANN,
Secretary.

Subscribed and sworn to before me
this 2nd day of July, 1919.
(NOTARY SEAL) WALTER E. SCHMIDT,
Notary Public of N. J.

SCHEDULE "A"

No. 3319

Jersey City, N. J., Mar. 4, 1901.

$3500.

THIRD NATIONAL BANK

Pay to the order of Otto H. Krause
Thirty-five hundred and 00-100.....Dollars

Eagle Brewing Company,
G. W. Lembeck,
Treasurer.

$3500.00

Countersigned
Henry Lembeck,
President.

Endorsements
Otto H. Krause
Pay to the Order of
The Second National Bank
of Jersey City, N. J.
Hudspeth Puster

Second National Bank, Jersey City.
March 6, 1901
Endorsements Guaranteed.

SCHEDULE "B"

Statement.

Date					
1901					
March	2	Chattel & R. E. Mtg.		3500.00	
1903					
Mch.	14	Loan	Ice Box	60.00	
		"	Prop. R.	200.00	
	14	"	Bottling wagon	200.00	
Dec.	8	"	Note	800.00	
1904					
Oct.	26	"	R. E. Mtg.	500.00	
1905					
Mar.	15	"	Ice box		
			Prop. R.	115.00	
1906					
June	1	"	Note	500.00	
1907					
July	11	"	Prop. R	168.88	
Sept.	10	"	Note	1500.00	
1908					
Sept.	14	"	"	500.00	
1901					
May	1		By a/c		21.20
	8		"		26.50
June	5		"		42.60
	17		"		43.70
Aug.	14		"		84.20
Sept.	11		"		52.20
Oct.	9		"		59.55
Nov.	6		"		32.00
Dec.	11		"		26.55
1902					
Jan.	8		"		29.70
Feb.	12		"		22.90
Mch.	12		"		18.50
Apr.	9		"		33.25
May	7		"		29.85
June	11		"		58.35
July	16		"		62.65
Aug.	20		"		75.70
Sept.	24		"		64.30
			Forward	7843.88	783.70

	Brot. Forward		7843.88	783.70
	1902	By a/c		
	Oct. 22	"		51.40
	Nov. 26	"		42.30
	Dec. 24	"		40.45
	1903			
	Jan. 14	"		25.90
	Feb. 25	"		23.80
	Mch. 18	"		23.60
10	Apr. 22	"		34.30
	May 13	"		58.00
	June 17	"		74.50
	July 15	"		70.10
	Aug. 26	"		107.05
	Sept. 16	"		76.95
	Oct. 21	"		84.00
	1904			
	June 15	"		20.00
	July 20	"		79.40
20	Oct. 19	"		25.00
	Nov. 23	"		25.00
	Dec. 21	"		25.00
	1905			
	Jan. 25	"		25.00
	Feb. 22	"		25.00
	Mch. 22	"		25.00
	Apr. 25	"		25.00
	May 24	"		25.00
	July 26	"		25.00
30	Aug. 23	"		25.00
	Sept. 20	"		25.00
	Oct. 18	"		25.00
	Nov. 22	"		25.00
		Forward	7843.88	1920.45

Brot. Forward			7843.88	1920.45	
1905		By a/c			
Dec.	20	"		25.00	
1906					
Jan.	10	"		25.00	
Feb.	21	"		25.00	
Mch.	28	"		25.00	
Apr.	25	"		25.00	
May	9	"		25.00	
June	20	"		25.00	10
July	18	"		50.00	
Aug.	22	"		50.00	
Sept.	19	"		50.00	
Oct.	17	"		50.00	
Dec.	12	"		50.00	
1907					
Jan.	9	"		50.00	
Feb.	13	"		50.00	
Mar.	13	"		50.00	
Apr.	17	"		50.00	20
May	14	"		50.00	
June	19	"		50.00	
July	17	"		50.00	
Aug.	14	"		50.00	
Sept.	18	"		50.00	
Oct.	16	"		50.00	
Nov.	13	"		50.00	
Dec.	25	"		50.00	
Dec.	25	"		50.00	
1908					30
Jan.	15	"		50.00	
Feb.	19	"		50.00	
Mch.	18	"		50.00	
Apr.	15	"		50.00	
		Forward	7843.88	3145.45	

	Brot. forward			7843.88	3145.45
	1908		By a/c		
	May	13	"		50.00
	June	17	"		50.00
	July	22	"		50.00
	Aug.	19	"		50.00
	Oct.	21	"		50.00
	Nov.	18	"		50.00
	Dec.	16	"		50.00
10	1909				
	Jan.	20	"		50.00
	Feb.	17	"		50.00
	Mch.	17	"		50.00
	Apr.	21	"		50.00
	May	19	"		50.00
	June	23	"		50.00
	July	21	"		50.00
	Aug.	18	"		50.00
	Sept.	22	"		50.00
20	Oct.	20	"		50.00
	Nov.	17	"		50.00
	Dec.	15	"		50.00
	1910				
	Mch.	9	"		119.50
		30	By allowance		428.93
		30	" balance		3200.00
				7843.88	7843.88

(Over)

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1910					
Mch.	30	To balance Chattel Mtge.		2700.00	
	30	" " R. E. Mtge.		500.00	
June	22	By account			50.00
July	20	" "			50.00
		Forward		3200.00	100.00
1918					
Oct.	19	R. E. Mtge.			500.00
1919					
Mch.	12	By account			12.00
		Balance			2588.00
				3200.00	3200.00
1919					
June	24	Balance	2588.00		

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STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } ss.:

John J. Towbin of full age, being duly sworn according to law, on his oath deposes and says: On Friday, May 9th, 1919, I went to Hackensack and demanded payment from Otto H. Krause of the promissory note and chattel mortgage mentioned in the bill of complaint and said Otto H. Krause refused to pay same.

On May 27, 1919, I attended a public sale of the chattels mentioned in the chattel mortgage conducted by Charles C. Townsend, the Sergeant at Arms of the District Court for the First Judicial District of Bergen County, and at said auction sale the said goods were sold for the sum of $30.00 being the highest price which could be obtained at such sale.

Deponent further says that the purchaser at said sale was one Krause. Deponent further says that defendant attended said sale, but made no bids.

JOHN J. TOWBIN.

Subscribed and sworn to before me
this 2nd day of July, 1919.
ELSIE F. WEILBACHER,
Notary Public of New Jersey.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } ss.:

D. Eugene Blankenhorn of full age, being duly sworn according to law, on his oath deposes and says: I am the attorney of the plaintiff. I engaged Charles C. Townsend, the Sergeant at arms of the District Court of the First Judicial District of Bergen County to make sale of the chattels mentioned in the bill of complaint. For making said sale I was compelled to pay said Charles C. Townsend the sum of $30.

On February 28, 1910, I was and still am a Master in Chancery of the State of New Jersey. On said date at Hackensack, New Jersey, the defendant in my persence signed, sealed and delivered the chattel mortgage mentioned in the complaint, I having first made known the contents of said chattel mortgage to said Otto H. Krause and I thereupon signed same as a subscribing witness. Thereupon the said Otto H. Krause acknowledged to me that he had signed, sealed and delivered the said chattel mortgage as his voluntary act and deed for the uses and purposes therein expressed and I affixed to said chattel mortgage my certificate of said acknowledgment.

D. EUGENE BLANKENHORN.

Subscribed and sworn to before me this 2nd day of July, 1919.

ELSIE F. WEILBACHER,
Notary Public of New Jersey.

Endorsement.

BERGEN COUNTY CIRCUIT COURT.

Between:

LEMBECK & BETZ EAGLE BREWING COMPANY, a corporation,
Plaintiff,

vs.

OTTO H. KRAUSE,
Defendant,

Action at Law.

NOTICE.

D. Eugene Blankenhorn,
Plaintiff's Attorney,
15 Exchange Place,
Jersey City, N. J.
19 July, '19.

Due Service acknowledged,
7/2/19 A. C. Hart & Vanderwart,
Atty. of Defdt.

Filed July 7, 1919,
George Van Buskirk.

Let this be filed.
July 7, 1919.
W. W. Cutler,
Judge.

7262

BERGEN COUNTY CIRCUIT COURT.

LEMBECK & BETZ EAGLE BREWING COMPANY, a corporation, Plaintiff, vs. OTTO H. KRAUSE, Defendant,	Action at Law. On Application for Summary Judgment. Memoranda.

CUTLER J.

After considering the briefs of counsel I have reached the conclusion that the plaintiff has a right to maintain his suit upon the covenant in the chattel mortgage that the defendant will pay, &c.

That being a covenant under seal the statute of limitations would not begin to run against it until sixteen years had elapsed, and the defenses that the cause of action did not accrue within six years, and that the note was barred by the six years statute, do not apply to the covenant under seal, and will be struck out.

The affidavits presented by the plaintiff in support of this application comply with the requirements of the Rules of the Supreme Court (Rules 80 to 84 both inclusive) and the plaintiff is entitled to his motion unless the defendant presents an affidavit or affidavits showing facts which entitle him to defend.

No such affidavit has been presented by the defendant, and the entering of judgment would prevent any further defense, if there is one on the merits.

If the defendant has any defense he may make such an affidavit and serve a copy on the attorney of the plaintiff on or before August 1st, 1919, and present the same to the Court at the Court House in Hackensack on Monday, August 4th, 1919, at 10 o'clock in the forenoon, to which time this application has heretofore been continued.

Endorsement.

"COPY"

BERGEN COUNTY CIRCUIT COURT.

Lembeck & Betz Eagle Brewing Company,
Plaintiff,
-vs.-
Otto H. Krause,
Defendant.

Memoranda.

Filed July 22, 1919.
Let this be filed
July 21, 1919.

BERGEN COUNTY CIRCUIT COURT.

LEMBECK & BETZ EAGLE BREWING COMPANY, a corporation,
Plaintiff,
vs.
OTTO H. KRAUSE,
Defendant,

Order for Summary Judgment.

It appearing by affidavit filed in the cause that there is no defense to the action, and the defendant, after due notice, having failed to show facts as to entitle him to defend;

IT IS ORDERED, that the defense be struck out and that final judgment be entered for the plaintiff for the sum of $2588.00 and costs.

WILLARD W. CUTLER,
Judge.

Dated August 4th, 1919.

Endorsement.

ORDER FOR SUMMARY JUDGMENT.

D. Eugene Blankenhorn,
15 Exchange Place,
Jersey City, N. J.

Filed Aug. 4, 1919.
George Van Buskirk,
County Clerk.

BERGEN COUNTY CIRCUIT COURT.

LEMBECK & BETZ EAGLE BREWING COMPANY, a corporation,
Plaintiff,
vs.
OTTO H. KRAUSE,
Defendant.

Action at Law.
B-I, P.-267

D. EUGENE BLANKENHORN,
Plaintiff's Attorney.

Amount of damages Two Thousand five hundred and eighty-eight dollars. And forty dollars and twenty-nine cents costs.

Damages	$ 2588.00
Costs	40.29
	$ 2628.29

Judgment signed and entered.
August 4, 1919, at 1 P. M.

BERGEN COUNTY CIRCUIT COURT.

LEMBECK & BETZ EAGLE BREWING COMPANY, a corporation of New Jersey.

Plaintiff,

vs.

OTTO H. KRAUSE,

Defendant.

Certificates.

STATE OF NEW JERSEY, COUNTY OF BERGEN. } ss.:

I, George Van Buskirk, Clerk of the County of Bergen, and also Clerk of the Circuit Court in and for said County, do hereby certify that the foregoing are true copies of the papers filed in the above entitled case and copy of judgment as the same is entered in Book I of Judgments of the Bergen County Circuit Court, page 267 for said County.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at Hackensack, N. J., this 4th day of September, 1919.

(SEAL)

GEORGE VAN BUSKIRK,
Clerk.

By W. S. DOREMUS,
Dy. C.

New Jersey Court of Errors and Appeals

LEMBECK & BETZ EAGLE BREWING COMPANY, a corporation of New Jersey, Plaintiff-Respondent, against OTTO H. KRAUSE, Defendant-Appellant.	Action at Law Brief and Points of Plaintiff-Respondent

Plaintiff-Respondent sued in the Bergen County Circuit Court to recover the sum due on a chattel mortgage made to it by Defendant-Appellant February 28, 1910, and under Rules 80 to 84, both inclusive, moved to strike out the answer filed by the Defendant-Appellant. The chattel mortgage, a copy of which was annexed to and made a part of the complaint (Case, p. 4, 11, 27-28) contained the condition that the mortgage should be void

> "if the party of the first part shall and do well and truly pay unto the said party of the second part, its successors, executors, administrators or assigns, on demand, the just and full sum of Twenty-seven hundred Dollars according to the tenor of a certain promissory note of even date herewith and made by the

party of the first part to the said party of the second part hereto," (p. 7, 11, 30-37)

and contained the covenant:

> "And I, the said party of the first part, for myself, my heirs, executors, administrators and assigns do hereby covenant, promise and agree to and with the said party of the second part, its successors and assigns, to pay the said sum of money and interest above mentioned at the time and times and in the manner above mentioned." (P. 11, 26-32.)

Defendant's answer denied that payment had been demanded or that any moneys were due; pleaded the statute of limitations in bar of the action; denied that the mortgage contained a covenant to pay; and denied that any consideration existed in the execution of the mortgage.

The questions raised on this appeal are (1) whether defendant was entitled to defend the action and (2) whether Plaintiff had a right of action upon defendant's covenant contained in the chattel mortgage, action upon the promissory note having been barred by the statute of limitations.

POINT I

Plaintiff, by affidavit filed in the cause, having verified its cause of action, and defendant having failed to show by affidavit or other proof such facts as would entitle him to defend, the answer was properly stricken out and judgment awarded plaintiff.

Plaintiff showed by affidavit that the consideration for the making of the chattel mortgage of $2,700 was part of a balance of $3,200 due on several loans made to defendant over a period from March 4, 1901 to March 30, 1910, a full statement of the several loans and payments on account thereof being annexed to the affidavit.

The affidavit set out that certain credits on account of the $2,700 were due defendant and alleged that affiant believed there was no defense to the action.

(Horstmann, pp. 16-23.)

Affidavit was made that payment had been demanded of the note and mortgage and Defendant had refused to pay same. (Towbin, p. 24.)

Defendant filed no affidavits in the cause.

The existing debt of defendant to plaintiff was sufficient consideration to support the new promise in the chattel mortgage to pay.

Colton v. Depew, 60 *N. J. Eq.* 454-458.

Demand for payment of the "chattel mortgage" was sufficient demand to support the cause of action.

1 *C. J.* 979, *Sec.* 76.

And plaintiff was excused from making further demand, the action of defendant in refusing to pay the mortgage showing such demand to be useless.

1 *C. J.* 980, *Sec.* 80.

But if the defendant intended to rely for his defense upon the want of consideration or failure of demand, or the allegation that there was nothing due from defendant to plaintiff, he must have filed an affidavit or other proof showing such facts and having failed to do so, the court properly struck out the answer. (Rule 80.)

The only other defense presented by the answer and argument involves the question of law discussed in Point II of this brief.

POINT II

Plaintiff's action on the covenant contained in the chattel mortgage that defendant would "pay the said sum of money * * * at the time * * * and in the manner above mentioned," viz., on demand * * * according to the tenor of a certain promissory note of even date" therewith, was not barred by the statute of limitations although action upon the note was barred.

At the commencement of this action, more than six years and less than sixteen years had elapsed since the making of the note and the chattel mortgage.

The question to be determined is whether plaintiff has a right of action against the defendant upon defendant's covenant contained in his chattel mortgage under seal that he "will pay the said sum of money and interest above mentioned at the time and times, and in the manner above mentioned," that is to say, "on demand * * * according to the tenor of a certain promissory note of even date herewith and made by the said party of the first part to the said party of the second part hereto," action upon the promissory note being barred by the statute of limitations, and action on the covenant not being barred by the statute of limitations.

The rule is stated in 25 Cyc. 999, generally as follows: "As a general rule, where a party has two remedies for the enforcement of a right, the one he chooses is not barred by the statute of limitations, merely because the other, if he had resorted to it, would have been."

This rule is followed by the cases in this state

where action has been brought under similar circumstances, those in point being *Wagoner v. Watts,* 44 N. J. L. 126; *Palmer v. White,* 65 N. J. L. 69; *Princeton Savings Bank v. Martin,* 53 N. J. Eq. 463 (and the authorities therein cited); and *Colton v. Depew,* 60 N. J. Eq. 454.

In *Wagoner v. Watts* (supra), the following sylabus sums up the holding of the court:

> "The written lease in this case is in effect an agreement not under seal, on which the surety has written an agreement under seal that he will pay the rent in default of payment by the lessee. This suit against the surety for the rent was brought after the lapse of more than six years from the due day of the rent. Held, that although the principal debtor might have pleaded in bar, actio non accrevit infra sex annos, on his contract not under seal, the action against the surety on his contract under seal will not be barred until the lapse of sixteen years."

The following excerpt from the opinion will aid in reaching a conclusion in this case:

> "The surety may have the benefit of any defense which the principal debtor may set up, showing that the contract never was legal, or that it had been annulled. To that extent, the rule prevails that the extinction of the liability of the principal debtor discharges the liability of the surety; the accessory obligation falls with the principal. As a general rule, the liability of principal and surety is co-extensive. There are exceptions, as in case of coverture and infancy, in which, the contract cannot be enforced against the principal. But when the principal is discharged from his obligation by *payment,* accord and satisfaction or release, recourse cannot be had to the surety. *In all these instances, in which both principal and surety are exonerated, the defense either shows in fact, or, in contemplation*

of law, implies an actual satisfaction of the obligation which the former has assumed. In this case, the debt is not discharged or satisfied by the lapse of the limitation time; the remedy only to enforce it against the principal debtor is taken away. In Stears v. Hartly, 3 Esp. 81, Lord Eldon said that the debt is not discharged by the operation of the Statute of Limitation; it was the remedy only, and that the creditor could hold goods on which he had obtained a lien for his claim, although the statute had run against it. To the same effect are Morse v. Williams, 3 Camp. 418, and Higgins v. Scott, 2 B. and Ad., 413.

"To this debt unpaid, the contract of the surety clings as a firm support in the law, like the obligation of an infant or feme covert, although the undertaking is voidable by the party to whose benefit it enures.

"Upon this ground, it is that a mortgage may be foreclosed and the land sold although the note thereby secured is barred by the statute, nothing less than payment of the debt will satisfy the condition. *Thayer v. Mann,* 19 Pick, 535; *Balch v. Onion,* 4 Cush. 559; *Wiswell v. Baxter,* 20 Wis. 680; *Borst v. Corey,* 15 N. Y. 505; *Reed v. Shepley,* 6 Vt. 602.

In *Ludlow v. Camp,* 7 N. J. L. 113, at p. 114, the court said:

"In the case of the Executors of Morris v. Condit (In Chancery of New Jersey), there was a bond and mortgage outstanding for sixteen years and more, without payment, and upon bill filed to foreclose, it was insisted, upon this very act, that the recovery upon the bond was barred, and the debt gone, and that therefore there could be no remedy upon the mortgage. But this argument was too flimsy for the present chancellor; he held that though the action of debt upon the bond was

> barred, yet the debt still subsisted and was not gone; and as there was another remedy which was not barred by the act, that is a subpoena in equity upon the mortgages, he decreed the debt to the complainants.

In *Colton v. Depew,* 60 N. J. Eq., 454, at p. 458, the court said:

> "Neither the statute of limitations which bars the obligee's right to maintain an action on the bond, nor the discharge of the obligor in bankruptcy, is an extinguishment of the debt. In both instances, the remedy is taken away, but the debt remaining would be a valid consideration for a subsequent express promise to pay. Briggs & Ely v. Sutton, Spenc. 581; Whyte v. McGovern, 22 Vr. 356. Notwithstanding the mortgagee has lost his action at law on the bond, his remedy under the mortgage still remains. Busw. Lim. Sec. 140, p. 201; 2 Jones Mort. Sec. 1204; Wagoner v. Watts, 15 Vr., 126, 129 (per Van Syckel, J.). It was so decided in Blue v. Everett, 11 Dick. Ch. Rep. 455."

There are numerous cases in other states holding that where there are two securities for the same debt, as a note and a mortgage, one of which is barred by the statute and the other not, the creditor, notwithstanding he has lost his remedy at law on the former, may pursue it in equity on the latter. The debt remains and a suit may be brought upon it and supported by a subsequent promise. The statutes suspend the remedy but do not cancel the debt.

Belknap v. Gleason, 11 *Conn.* 160.
Thayer v. Mann, 11 *Pick.* 535.
Elkins v. Edwards, 8 *Ga.* 325.
Wood v. Goodfellow, 43 *Cal.* 185.
Booker v. Armstrong, 93 *Mo.* 49.
Cheney v. Stone, 29 *Fed. Rep* 885.

Holding that an action will lie on a covenant for payment contained in a mortgage, although the promissory note referred to in the mortgage is barred by the statute, is *Earnshaw v. Stewart,* 64 Md. 513.

Holding that although a mortgage which is one of indemnity merely is barred in six years under the Indiana Statute of Limitations, a mortgage which contains a covenant or express agreement t pay the sum of money thereby secured is not barred in six years, is *Crawford v. Hazelrigg,* 117 Ind. 63, 2 L. R. A. 139.

Holding that foreclosure of mortgage is not barred by bar of action on notes secured is *Hulbert vs. Clark,* 128 N. Y., 295, 14 L. R. A. 59 (N. Y. Court of Appeals).

The construction of limitation laws is largely local and, although originally obtained from a common source, much altered by statutes. The great weight of authority sustains the New Jersey rule, viz., that the statute only suspends the remedy and does not annihilate the debt, and therefore an action on the mortgage is not affected by the fact that an action on the note is barred. The following are the states sustaining the New Jersey rule:

Alabama—

Connecticut—

Belknap v. Gleason, 11 Conn. 164.

Hough v. Bailey, 32 Conn. 289.

Florida—

Browne v. Browne, 17 Fla. 607; 35 Am. Rep. 96.

Georgia—

Elkins v. Edwards, 8 Ga. 325.

Idaho—

Maine—

Crooker v. Holmes, 65 Me. 195; 20 Am. Rep. 687.

Maryland—
Earnshaw v. Stewart, 64 Md. 513.
Massachusetts—
Thayer v. Mann, 19 Pick. 536 (*Cited in Wagoner v. Watts*).
Eastman v. Foster, 8 Met. 19.
Norton v. Palmer, 142 Mass. 433.
Craine v. Paine, 4 Cush. 483; 50 Am. Dec. 807.
Balch v. Onion, 4 Cush. 559 (*Cited in Wagoner v. Watts*).
Minnesota—
Ozmun v. Reynolds, 11 Minn. 459.
Missouri—
Lewis v. Schwenn, 93 Mo. 26.
Nebraska—
Cheney v. Campbel, 28 Neb. 376.
Cheney v. Stone, 29 Fed. Rep. 885.
Nevada—
Cookes v. Culbertson, 9 Nev. 199.
New Hampshire—
Hargreaves v. Igo, 46 New Hamp. 619.
New York—
Pratt v. Huggins, 29 Barb. 277.
Heyer v. Pruyn, 7 Paige 465; 4 L. ed. 232; 34 Am. Dec. 359.
Gillette v. Smith, 18 Hun. 10.
Borst v. Corey, 15 N. Y. 505 (*Cited in Wagoner v. Watts*).
North Carolina—
Arrington v. Rowland, 97 N. C. 127.
Ohio—
Gary v. May, 16 Ohio, 66.
Oregon—
Meyer v. Boal, 5 Or. 130.
Rhode Island—
Ballou v. Taylor, 14 R. I. 277.
South Carolina—
Nichols v. Briggs, 18 S. C. 473.
Vermont—
Richmond v. Aiken, 25 Vt. 324.
Virginia—
Paxton v. Rich, 85 Va. 378; 1 L. R. A. 378.

West Virginia—
Criss v. Criss, 28 W. Va. 388.

Wisconsin—
Corney v. Pawlett, 66 Wisc. 262.

In Arkansis, Michigan, Mississippi, Minnesota and North Carolina, the rule is fixed by statute, which statute operates directly on the mortgage. They have statutes in all the states operating on the debt, and the contention has been that this also affected the mortgage, which rule is substantially denied in the decisions above.

The opposite rule is applied in the following states:

Arkansas—
(By statute.)

Michigan—

Mississippi—
(By statute.)

California—
McCaskey v. White, 21 Cal. 495; 82 Am. Dec. 754.

Illinois—
Harris v. Mills, 28 Ill. 44; 81 Am. Dec. 259.
(Barred unless mortgage contains express promise to pay.)
Bridges v. Blake, 106 Ind. 332.

Iowa—

Kansas—
Schmucker v. Sibert, 18 Kas. 104; 26 Am. Rep. 765.

Kentucky—
McCracken v. Mercantile Tr. Co. 84 Ky. 344.

Texas—
Perkins v. Sterne 23 Tex. 561; 76 Am. Dec. 72.
Elwell v. Daggs, 108 U. S. 143.
(See 21 L. R. A. 550, Footnote.)

It is respectfully submitted that plaintiff's right to sue defendant upon defendant's covenant to pay contained in the chattel mortgage is not barred by the statute of limitations and for the reasons above set forth the judgement of the Bergen County Circuit Court should be affirmed.

D. Eugene Blankenhorn,
Attorney for Plaintiff-Respondent.

New Jersey Court of Errors and Appeals

LEMBECK & BETZ EAGLE BREWING COMPANY, a corporation, Plaintiff Appellee, vs. OTTO H. KRAUSE, Defendant Appellant	Action at Law. Brief and Points of Defendant Appellant.

On March 2nd, 1901, the plaintiff loaned the defendant herein $3,500.00, this being evidenced by a check, a copy of which appears on Page 18 of the case. Other moneys were loaned by and returned to the plaintiff until March 30th, 1910, when the balance of debt owing by the de fendant to the plaintiff being $3,200.00, the defendant paid it by

1. Executing a bond conditioned upon the payment of $500.00, secured by a real estate mortgage, and

2. A promissory note for $2,700.00, secured by a chattel mortgage.

The real estate mortgage was paid on October 19th, 1918.

No moneys were paid upon the promissory note, or the chattel mortgage securing it after their execution. The statement attached to the affidavit used on motion to strike out the defences (page 23) indicates the following payments:

June 22nd, 1910.....$50.00
July 20th, 1910.....$50.00
March 12th, 1919.....$12.00

These items do not conform to the complaint. It does not appear whether they were allowances or cash payments, or what they represented. As a matter of fact, the liability upon the promissory note ended on March 30th, 1916, and there was no payment thereafter which enlivened it.

While the statement (page 19) indicates the receipt of

the chattel and real estate mortgages on March 2nd, 1901, there is another item of receipt of these instruments (page 23) on March 30th, 1910.

The chattel mortgage itself (page 8) bears date February 28th, 1910, and it is apparently a fact that on February 28th, 1910, $3,200.00 was owing by the defendant to the plaintiff and the repayment was secured in the manner hereinbefore indicated.

On May 9th, 1919, and after the statute of limitations had relieved the defendant from liability upon the note, the plaintiff demanded payment of the $2,700.00, remaining due thereon, and upon the defendant refusing to pay, on May 27th, 1919, the plaintiff, as mortgagee, seized the mortgaged chattels and sold them, receiving at the sale only sufficient to pay the costs thereof.

The plaintiff thereupon instituted an action at law in the Bergen County Circuit Court against the defendant alleging that in the execution of the chattel mortgage, "the defendant among other things covenanted, promised and agreed to and with the said plaintiff to pay the plaintiff said sum of $2,700.00 on demand, etc."

The credits allowed by the plaintiff in its affidavits, and particularly that of $12 credited as of March 12th, 1919, do not appear in the complaint, and hence the defendant has not been allowed an opportunity to join issue upon the bona fides of this credit.

The defendant answered (pages 13 and 14) denying several allegations and placing the plaintiff upon proof of other paragraphs of the complaint.

The defendant presented as defences:

1. That the chattel mortgage contained no covenant to pay moneys.

2. That the chattel mortgage was merely security for the debt—that the actual debt was represented by the promissory note.

3. The condition in the chattel mortgage is, that "if the said party of the first part shall and do well and truly pay unto the said party of the second part, its successors, exe-

cutors, administrators or assigns on demand the just and full sum of $2,700.00 according to the tenor of a certain promissory note of even date herewith and made by the said party of the first part to the said party of the second part hereto, then these presents shall be void.'' The ''tenor'' of the promissory note does not appear.

4. That no consideration existed in the execution of the chattel mortgage.

5. A notice of motion to strike out the complaint as it disclosed no cause of action, etc.

Thereafter the plaintiff moved to strike out the answer of the defendant and for judgment final, and attached thereto, were affidavits which did not conform to the complaint.

The Court on August 4th, 1919, struck out the defences and awarded judgment final for the plaintiff and against the defendant for $2,588.00 and costs. And from this order the defendant appeals:

POINT 1:

The affidavits used by the plaintiff in his motion for judgment (pages 16-26, inclusive) do not conform to the complaint (pages 4-11, inclusive).

The complaint describes only the chattel mortgage, alleges the demand for payment of $2,700.00, and recites the sale of the chattels, the amounts received thereat and concludes with a demand of $2,700.00.

The affidavit describes *an account,* alleges that $2,588.00 is due the plaintiff from the defendant.

We respectfully submit that the amount demanded upon the chattel mortgage was larger than was owing and the defendant was right in refusing to pay the same.

POINT 2:

There is no covenant in the chattel mortgage in which the defendant agrees to pay moneys to the plaintiff.

The plaintiff points to a clause on the second page of the chattel mortgage to establish this covenant. It is—

> "And I, the party of the first part x x x do hereby covenant, promise and agree to and with the said party of the second part x x x to pay the said sum of money and interest above mentioned at the time and times and in the manner above mentioned."

"The sum of money x x x above mentioned" is the just and full sum of $2,700.00 *according to the tenor* of a certain promissory note.

The *tenor* of the the promissory note does not appear. The affidavit attached to the chattel mortgage (page 10) describes the consideration as "the just and full sum of $1,500.00, being money loaned and advanced said mortgagor by the said mortgagee." Yet, the affidavits used on motion to strike out allege that $2,700 was the amount advanced, and that this was not *then* paid, but that it represented the balance of an account then owing. The affidavit that the same man, Horstmann, used on the motion to strike out (page 17) states that the defendant owed the plaintiff $3,200.00 on March 30th, 1910, and then gave the plaintiff the promissory note and chattel mortgage mentioned in the complaint for $2,700.00.

Another affidavit (page 24) used on the motion for judgment describes a "promissory note mentioned in the bill of complaint." None appears in the "complaint."

Indeed, there is nothing appearing in the State of the Case which describes the "tenor of the promissory note!"

Moreover, we submit that the clause quoted first above in "Point 2" relates back to the promissory note described in the chattel mortgage and establishes the entire instrument as security alone for the payment of that note and *defeats the purpose of the plaintiff to establish the mortgage as a new obligation to pay!*

> "The primary object in construing a chattel mortgage must be to ascertain the intentions of the

parties, which must be determined from a consideration of the instrument as a whole."

11 C. J. 492.

"It should be strictly construed against the mortgagee."

Ibid.

POINT 3:

The description of the promissory note and its "tenor" does not appear, nor whether the note is, as yet, even due.

The defendant in his answer required the plaintiff to prove the allegations of its complaint, one of which assuredly is the "tenor" of the primissory note and that the defendant did not pay $2,700.00 as required therein.

No reply was filed to the answer of the defendant, which alleged that the promissory note and not the chattel mortgage, was the actual debt.

POINT 4:

The covenant in the chattel mortgage to pay, etc., was not supported by a valid consideration.

The defendant asserts that even if the intention of the parties was to create a new debt, no consideration passed between the two, *and hence the defendant is not liable!*

"Every chattel mortgage to be valid and enforcible, must be supported by a valuable consideration."

11 C. J. 449.

"An agreement or promise made without consideration, does not amount to a contract and is unenforcible."

Morford v. Nuck, 3 N. J. L. 1031.

Clyne vs. Holmes, 61 N. J. L. 358.

"A bond barred by the statute of limitations, on which no payment has been made within sixteen years, is not a sufficient consideration to support an action or an express promise to pay it."

Ludlow v. Van Camp.

7 N. J. L. 113.

POINT 5:

The chattel mortgage was merely the security for the debt.

The further defence is that the chattel mortgage is merely a security for the payment of the debt. Of course we must concede that a lien upon the chattels existed, yet the debt itself was the promissory note described and the complaint indicates that no payments were made upon the said note within six years from its date and *hence the statute of limitations has barred it!* In short—the chattel mortgage created no new debt—it was merely given as security for the old, and while the chattels might be seized and sold, no suit may be maintained upon the original note now.

> "Payment of a debt secured by a chattel mortgage is a satisfaction of the mortgage and extinguishes the title conveyed by it."
>
> Freeman v. Freeman, 17 N. J. Eq. 44.
>
> "The mortgage debt is not discharged, but the remedy to enforce it against the principal debt is taken away by the lapse of the limitation of time."
>
> "A mortgage may be foreclosed and the land sold, altho the bond secured thereby is barred by the statute."
>
> Palmer v. White, 65 N. J. L. 69.
>
> "It is a general rule that a creditor may hold and realize on collaterals pledged to secure a debt, altho action on the principal obligation be barred by limitation."
>
> 25 Cyc. 1001.
>
> "According to the weight of judicial authority, if the statute of limitations has not barred the remedy on a mortgage or deed for security, such remedy may be enforced, altho action on the debt secured or the evidence thereof be barred."
>
> Ibid.
>
> "A chattel mortgage is a conveyance of some

present legal or equitable right in personal property, as security for the payment of money or for the performance of some other act.''

11 C. J. 398.

We respectfully submit that the defences should not have been stricken out and judgment should not have been awarded for the plaintiff!

A. C. HART & VANDERWART,
Attorneys of Defendant-Appellant.

Dated October 28, 1919.